

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
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25 RUSSELL SQUARE
LONDON W.C.1

No. 5 of 1972

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR (APPELLATE
JURISDICTION)

BETWEEN

LIM YAM TEK alias AH THAW and
TAN LAY CHUAN alias TAN AU LIAK Appellants

AND

10 THE PUBLIC PROSECUTOR Respondent

CASE FOR THE RESPONDENT

Record

1. This is an appeal by special leave against the dismissal by the Federal Court of Malaysia holden at Kuala Lumpur on the 1st April 1971 of the Appellants' Appeals against conviction of murder and sentence of death in the High Court of Malaya at Ipoh on the 27th November 1970.

2. The Appellants were charged as follows:-

20 (1) "that you, jointly together with two others on the 19th day of April, 1969, at about 8.30 p.m. at Seberang Port Weld, Taiping in the District of Larut and Matang, in the State of Perak in furtherance of the common intention of all, did commit murder by causing the death of one Ong Chan Tian alias Ong Ah Peow, and that you have thereby committed an offence punishable under section 302 read with section 34 of the Penal Code."

30 (2) "that you, jointly together with two others on the 19th day of April 1969,

at about 8.30 p.m. at Seberang Port Weld, Taiping in the District of Larut and Matang, in the State of Perak, in furtherance of the common intention of all, did an act, to wit, stabbed Ong Yu Sew with a dagger with such intention and under such circumstances that if by that act you had caused the death of the said Ong Yu Sew you would have been guilty of murder, and that you caused hurt to the said Ong Yu Sew by the said act and that you have thereby committed an offence punishable under section 307 read with section 34 of the Penal Code." 10

At the request of the prosecution the second charge was stood down and the trial on the first charge proceeded and was heard between the 23rd November 1970 and the 27th November 1970.

The evidence for the prosecution was as follows :- 20

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(1) P.W.1. Dr. Padmakanthan

This witness examined the deceased and on external examination found multiple stab wounds on several parts of his body. She determined the cause of death as haemorrhage due to stab wounds of the heart and lung and expressed the view that death was almost instantaneous. Under cross-examination she stated that the deceased must have had excessive bleeding as a result of the stab wounds and that he must have staggered for a few feet and then must have fallen down. She stated it as her opinion that she did not think that he could have run away for a distance of about 100 yards after receiving these injuries. 30

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(2) P.W.2. Ong Yu Sew alias Ong Ah Sew.

This witness was a childhood friend of the deceased and was one of the most important witnesses for the prosecution. He stated that at about 7 p.m. on the 19th April 1969 he went together with the deceased to see a Chinese Stage 40

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Show at Sebarang Port Weld. He stated that the Show commenced at about 8 p.m. and that there were many people watching the Show and that the area was brightly lit with electric lights. He stated that Ong Ban Kim and Ong Chuan Kee alias Ong Chuan Heng, (brothers of the deceased) stood behind him and the deceased about 10 feet away. He stated that as he and the deceased were seated together four people came from behind and 10 stabbed the deceased and he fell down. On seeing that, P.W.2. started to run away but before he did so had a look at the assailants and was able to identify all four of them by name, including the two appellants. He further stated that having run a short distance the same four assailants caught up with him and stabbed him. He further stated that he knew the four assailants long before the incident. Under cross-examination he denied that he was a 20 member of a secret society at the time of the incident and stated that he did not know if the deceased was a member of such a society. He stated that he and the deceased were seated more or less at about the middle in the front half facing the stage. After the attack on the deceased he stated that he ran towards the Temple which later evidence suggested was 50 yards from the Stage. Later he stated that he and the deceased were seated at a distance 30 which he believed to be the distance from the witness box to the opposite wall (about 33') from the stage. He denied that at the beginning of 1968 the deceased and himself had invited the appellants to join a secret society and that they refused.

(3) P.W.3. Ong Ban Kim alias Ong Cha Koon

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This witness was the elder brother of the deceased, and he stated that on the 19th April 1969 he went to the Show at Sebarang, and 40 noticed the deceased about 28 feet in front of him. P.W.3 was watching the Show together with another brother Ong Ah Heng. He stated that he saw four persons stabbing the deceased and he too identified them by name and identified the appellants in Court. He stated that two of the assailants chased P.W.2 and the other two

continued stabbing the deceased but that after the stabbing, all four assailants ran away. He stated that P.W.2 ran away and that he did not know what happened to him. He went on to relate how he and Ong Ah Heng transported the deceased to Port Weld where Ong Ah Heng took him to the District Hospital at Taiping and the witness made a report to Port Weld Police Station. He then stated that he went together with ASP de Silva to the scene and then returned home. He stated that he had known the four assailants since his childhood days. In cross-examination it was put to him (a) that the deceased had run and was stabbed in front of the house belonging to Ong Eng Kek, and (b) that he was stabbed by only one of the four assailants identified, (neither of the appellants). He denied both suggestions. He further stated under cross-examination that he was aware of the identity of the assailants at the time he made the report to the Police. He went on to say that he could not remember whether or not he had given the names of the four assailants to the Police Officer but recollected that at the preliminary examination he had said that he did give the names of the assailants to the Police Constable. He denied a suggestion that the deceased himself and P.W.2 had threatened the appellants separately in early 1968 if they did not join a secret society.

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(4) P.W.4 Hassan Bin Man PC 22960

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This witness stated that on the 19th April 1969 at about 9 p.m. he was on duty at the Police Station at Port Weld. At about that time P.W.3 came to the Police Station looking very frightened and very excited. The Officer took down what P.W.3. had to say in writing, but P.W.3. did not sign the report. Under cross-examination he said that P.W.3. did not give the names of the deceased's assailants to him.

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(5) P.W.5 Haran Bin Yeop Said P.C.2092

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This Officer gave formal identification evidence.

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(6) P.W.6. Mohammed Taib Bin Haji Admad. D/Cpl.
no. 4277

This witness stated that he was a police photographer attached to Taiping Police Station and on the instructions of ASP de Silva he took certain photographs which are exhibited to the record of appeal. These photographs were taken at about 9.30 p.m.

(7) P.W.7 ASP de Silva

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10 This Officer stated that at about 9.05 p.m. on the 19th April 1969 he received a telephone call from P.W.4 as a result of which he went to the District Hospital Taiping where he saw the deceased and also P.W.2 who was too badly injured to speak. He then proceeded to Seberang together with P.W.6 but he does not state specifically the time when he arrived. The Stage Show was still proceeding and the Officer stated that visibility at the scene was very good and that fluorescent lighting was used to light up the Stage Show. He made an
20 examination of the scene which revealed some blood stains on a bench about 25 yards away from the stage and a small pool of blood on the floor of the Temple. He also gave evidence of arrest. Under cross-examination he stated that the breadth of the open space in the front of the stage was about 30-40 yards. He also stated that apart from the stage lights there were no other lights in the square open space. He
30 stated that the stain on the bench was about one inch in diameter and that there were a few drops of blood on the ground near the bench. On re-examination he stated that this blood stain was damp.

That completed the case for the Prosecution.

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3. Both appellants gave evidence for the Defence, the first to do so being Lim Yam Tek He stated that he had employment in Singapore but that in response to a letter from his family he had returned to Seberang to worship the Temple God. He stated that on the evening
40 of the 19th April 1969 in response to a suggestion made by Puah In Tian alias Puah Char Bo, he and Puah In Tian went together to watch the Stage Show. While there he noticed a

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commotion from the spectators on the righthand side of the stage. Five minutes later these spectators walked slowly away then he and Puah In Tian left and he went home to sleep. He also stated that in January 1968 he met the deceased, P.W.2 and P.W.3 and they made threats in relation to his refusal to join their secret society. Under cross-examination he stated that he and Puah In Tian were watching the Show from the lefthand side of the stage about 30-40 feet away from the stage. He further stated that he had made no complaint in respect of the threat that he alleged against the deceased, P.W.2 and P.W.3.

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4. D.W.2. Puah In Tian, alias Puah Char Bo was called for the Defence.

He supported the first appellant's account of the relevant events. In addition he stated that when walking home having separated from the 1st appellant he saw blood on the ground in front of the house of Ong Eng Kek. Under cross-examination he stated that he was standing on the lefthand side of the Stage about 39 feet away from the Stage. He stated that the blood he saw outside Ong Eng Kek's house was all over the ground in patches over an area of about 3 or 4 feet in diameter and that the patches of blood were in front of the house and to the right about 8 feet away. He further stated that these patches were being looked at by many people.

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5. The second appellant gave alibi evidence, and this can shortly be summarised by stating that at the relevant time he was being conveyed in a taxi from Taiping to Port Weld. He too alleged in evidence that he had been threatened by the deceased, P.W.2 and P.W.3 if he did not join their secret society.

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6. He called in his support D.W.4, Mat Bin Darus who stated that he was a taxi driver and had indeed conveyed the second appellant from Taiping to Port Weld. Both the second appellant and D.W.4 stated that an Indian had gone with them on the journey as far as Matang, but he was not called as a witness.

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7. The final witness for the defence was D.W.5 Ong Eng Kek. He stated that he was the Ketua of Seberang. He stated that he knew the deceased who also lived in Seberang. He went on to say that about 8.30 p.m. on the 19th April 1969 he was inside his shop and that he heard people quarrelling outside and came out to see the deceased lying on the road outside in front of his shop and he could see that he was bleeding. He stated that the Stage Show was taking place about 150 feet away from his shop. Under cross-examination he stated that the deceased was lying about 7-8 feet away from his shop and that he saw many people running home. He stated that when he saw the deceased lying on the ground in that condition he got frightened and closed up his shop and remained inside, for fear that people might run into his shop. He stated that he did not give any statement to the police about what he had seen on that night and went on to say that he believed the Police were in front of his house on that night but he did not approach them because they did not call him. He stated that he was unable to identify any of those persons whom he saw running away from in front of his shop.

8. By a majority verdict of 5 to 2 the Jury found the appellants guilty of the murder and they were sentenced to death. The Appellants appealed to the Federal Court of Malaysia against their conviction. This was dismissed, Ong C.J. dissenting.

The Respondent submits that in his dissenting judgment the learned Chief Justice fell into a number of errors. In particular:-

(i) He placed reliance on P.W.3's statement that two only of the four assailants chased P.W.2. But it is submitted that this was not inconsistent with P.W.2's statement that "The same four caught up with me", for the assailants may well have divided momentarily, two continuing to stab the deceased (who suffered some 18 separate wounds) before catching up the others and joining in a second

assault on P.W.2. Furthermore, P.W.3 continued: "After the stabbing all the four assailants ran away", which is more consistent with their having run away together, and supports this reconciliation of the evidence of P.W.2 and P.W.3.

(ii) Ong C.J. appears to have thought important the discrepancy between P.W.2's estimate of the distance he and the deceased were from the Stage (measured by comparison with the Courtroom - 10 apparently an actual distance of 38 feet) and P.W.7's estimate that the blood he found was "about 25 yards from the stage." It is submitted that witnesses' estimates of distance are notoriously unreliable and that this discrepancy is not necessarily of any significance.

(iii) The learned Chief Justice fell into a more serious error in asserting (a) that the small pool of blood on the Temple Floor "could only have flowed from the wounds of" P.W.2, and (b) 20 that it was abundantly clear that (P.W.3) must have been an eye-witness to the felling of (P.W.2) if it was true that he saw the killing of his brother."

As to (a) above, while this was probably correct it was no more than an inference - there was no evidence that P.W.2 had in fact fallen in the Temple. As to (b), it is submitted that P.W.3 was probably far more concerned with the violent attack upon his brother, only a few 30 yards in front of his eyes, than the subsequent events involving P.W.2. Furthermore, if the inference was correct that P.W.2 was felled in the Temple where the pool of blood was found, then P.W.3 could not have been an eye-witness thereto, as the learned Chief Justice asserted.

(iv) The learned Chief Justice assumed that because Puah Char Bo (D.W.2) who supported the first accused's evidence, was a good friend of P.W.3 according to the latter, this went "a long way to show that he was wholly unbiased." It is 40 respectfully submitted that no such inference could be drawn: D.W.2 admitted that he was a good friend of the first accused.

(v) The learned Chief Justice failed to notice a significant discrepancy between the evidence of the first accused and D.W.2 as to how and when the latter had learned that the first accused had returned from Singapore; compare page 18-10 with 18-20. It would appear from the record that when this was pointed out to D.W.2 by the prosecution he then altered his evidence (page 18, 10-20) and the Jury may well have been unfavourably impressed.

(vi) With regard to the alibi defence of the second accused, the learned Chief Justice regarded the evidence of the taxi driver, D.W.4, as fully corroborating this defence and further pointed out that there was nothing in the record to show that such evidence was concocted. But the more cogent criticism of D.W.4 (who had admittedly known the second accused and his mother for some 4 years previously) is that he appears to have over-corroborated the second accused's story. The second accused had not suggested in his evidence that he was in a hurry to reach Port Weld - so much so that he was prepared to pay two fares to the taxi driver, one for himself and another for the vacant seat. Nothing of this was mentioned by the second accused, although it would presumably have been an unusual and therefore memorable part of his alibi.

(vii) D.W.4 claimed that on arrival of the taxi at Port Weld he had alighted and walked up to his uncle's house. Neither his uncle, nor any other corroborative evidence except the taxi driver, was called by the Defence.

(viii) The learned Chief Justice also suggested that no criticism could reasonably be made of the last defence witness, the village headman. This witness alleged that, on hearing a quarrel, he had come out of his shop and, there being a light outside, had seen the deceased dead or dying outside his shop and many people running home from in front of his shop. Yet (a) he was apparently unable to identify any of such people, although Seberang Port Weld is a small isolated fishing village and the headman would

presumably know most if not all the inhabitants; and (b) he never reported the matter to the police, either later that evening when he believed they were outside his house, nor at any subsequent date - although he must, if his account were true, have known that he could give vitally material evidence as to the murder.

(ix) In addition to the fact that the majority of the Jury must have been wholly unimpressed by the defence witnesses, two significant suggestions had been put by Defence Counsel during cross-examination of P.W.3 which were totally inconsistent with the subsequent defences of both accused. It was first suggested that the deceased ran and was stabbed in front of the headman's house. Secondly it was suggested that the deceased had been stabbed only by Lau Weng Thong, the first of the four assailants identified by both P.W.2 and P.W.3. The Jury may well have wondered how either suggestion could have been made, consistently with (a) the first accused's case that he saw nothing of the deceased or Lau Weng Thong that evening, and (b) the second accused's defence that he was not even present.

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(x) The learned Chief Justice impugned the credibility of the prosecution witnesses P.W.2 and P.W.3 on three grounds, only one of which, it is submitted, carries any substantial weight - namely, the failure of P.W.3 to name the assailants that evening to the Police. The learned Chief Justice then imputed a motive to both P.W.2 and P.W.3 for what he concluded was a conspiracy to implicate the accused falsely, namely (a) that they were members of a secret society, (b) that the attacks on the deceased and P.W.2 were "undoubtedly" the result of "some secret society feud" and (c) that P.W.2 and P.W.3 were gangsters who would themselves "not hesitate to use the knife" and would thus not hesitate to bear false witness against their enemies. The Jury had heard the defence allege some of these facts and the motive which might have been inferred from them. They must be assumed to have disbelieved them, and the learned Chief Justice was not, it is

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respectfully submitted, justified in drawing his own different conclusions from the simple conflict of oral evidence which was essentially a jury matter.

(xi) The learned Chief Justice commented adversely on the prosecution's failure to call an independent witness "to rebut the defence case that the deceased was not struck down before their (P.W.2 and P.W.3) very eyes".
 10 There is no indication that the prosecution was aware of the defence case until cross-examination of the prosecution witnesses had begun. In any event, and giving due consideration to the burden of proof, it is submitted that the same comment can properly be made of the failure of the defence to call such a witness, particularly bearing in mind that both appellants were of local origin and could reasonably be supposed to know many persons in
 20 the area.

(xii) As to the powers of the Federal Court in criminal appeals, the Respondent submits that the learned Chief Justice was wrong in purporting to extend Section 60 (1) of the Courts of Judicature Act 1964. He himself stated that it had always been the practice of the Federal Court to follow the principles laid down in Section 4 (1) of the Criminal Appeal Act 1907 when considering its powers
 30 under Section 60 (1). Just as, in England, it required express amendment of Section 4 (1) of the 1907 Act to enlarge the powers of the Court of Appeal, Criminal Division, so equally, it is submitted, a statutory amendment of Section 60 (1) would be required to enable the Federal Court to allow an appeal upon the grounds stated by the Chief Justice. It is furthermore submitted that whether such amendment is
 40 necessary or not is a matter of procedure, for final determination by the Federal Court itself.

(xiii) The Respondent submits that the criticisms by the learned Chief Justice of the prosecution evidence, and his conclusion as to the credibility of the defence evidence were unjustified. Furthermore, such criticisms of

the trial Judge's summing up as may be made were not such as should lead to a reversal of the Jury's verdict and, on this part of the appeal, the Respondent respectfully adopts the view of the majority of the Federal Court.

9. The Respondent therefore respectfully submits that the Appeals should be dismissed and that the convictions should be upheld and the sentences affirmed for the following, among other,

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REASONS

(1) BECAUSE the Jury was adequately directed as to the burden and standard of proof.

(2) BECAUSE the issues of fact were adequately defined to the Jury.

(3) BECAUSE the Jury was sufficiently directed that questions of fact were for them and for them alone.

(4) BECAUSE the Defences of both appellants were adequately put to the Jury by the learned Judge in their essentials.

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(5) BECAUSE the Appeals were dismissed upon the proper application of Section 60 (1) of the Courts of Judicature Act, 1964 by the majority of the Federal Court.

ROBERT GATEHOUSE Q.C.
W.P. ANDREAE-JONES

5 OF 1972

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B E T W E E N :

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- and -

TAN LAU CHUAN alias TAN AH
LIAM

Appellants

and

THE PUBLIC PROSECUTOR

Respondent

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